UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

WHOLE FOODS MARKET SERVICES, INC.

and

SAVANNAH LYNN KINZER, SUVERINO FRITH, LEEA MARY KELLY, ANA BELEN DEL RIO RAMIREZ, CAMILLE TUCKER-TOLBERT, TRUMAN READ, ABDULAI BARRY, HALEY ASHLEY EVANS, CASSIDY VISCO, JUSTINE O'NEILL, SARITA WILSON, LYLA MARCELLA STYLES, YURI LONDON, SHANNON LISS-RIORDAN, CHRISTOPHER MICHNO, KIRBY BURT, AND KAELEB RAE CANDRILL, AS INDIVIDUALS.

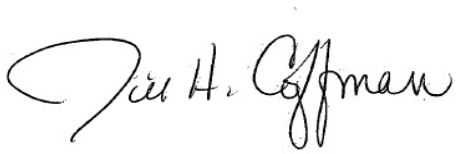
Cases
01-CA-263079; 01-CA-263108;
01-CA-264917; 01-CA-265183;
01-CA-266440; 01-CA-273840;
04-CA-262738; 04-CA-263142;
04-CA-264240; 04-CA-264841;
05-CA-264906; 05-CA-266403;
10-CA-264875; 19-CA-263263;
20-CA-264834; 25-CA-264904;
32-CA-263226; 32-CA-266442

ORDER DESIGNATING LOCATION OF HEARING

The hearing in the above matter will commence at 9:00 a.m., on August 9. 2022, at the following location:

Philip Burton Federal Building
450 Golden Gate Avenue, Arizona Room, 2nd floor
San Francisco, CA 94102

DATED AT San Francisco, California, this 8th day of July, 2022.



JILL H. COFFMAN
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

Effective July 26, 2022, our new address is 450 Golden Gate, Suite 3-3112, San Francisco, CA 94102.

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BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

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and	**Cases 01-CA-263079; 01-CA-263108; 01-CA-264917; 01-CA-265183; 01-CA-266440; 01-CA-273840; 04-CA-262738; 04-CA-263142; 04-CA-264240; 04-CA-264841; 05-CA-264906; 05-CA-266403; 10-CA-264875; 19-CA-263263; 20-CA-264834; 25-CA-264904; 32-CA-263226; 32-CA-266442**
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CHARGING PARTIES' APPLICATION TO PERMIT REMOTE TESTIMONY OF JUSTINE O'NEILL AND JOLINA CHRISTIE, OR FOR REMOTE HEARING

I. INTRODUCTION

Charging Parties Justine O'Neill and Jolina Christie hereby respectfully request permission to testify remotely by videoconference as part of the above-captioned matter. The Charges filed on behalf of Ms. O'Neill and Ms. Christie are being tried as part of the Week 7, Washington, D.C., phase of this consolidated hearing (the Charges relate to the Virginia store location, as filed by Ms. O'Neill, and the Maryland store location, as filed by Ms. Christie). The Washington D.C. phase is currently scheduled to proceed in-person, on July 19-22, 2022.

Ms. O'Neill and Ms. Christie, however, have both relocated since they filed Charges against Whole Foods and currently live in Washington state and Hawaii, respectively. Traveling back to Washington, D.C. would present an undue hardship for these Charging Parties, where the Parties may instead proceed with this phase of the hearing remotely by video conference. As set forth herein, there is good cause based on compelling circumstances to permit Ms. O'Neill and

Ms. Christie to testify remotely and there are appropriate safeguards in place for their testimony to proceed remotely. See Section 102.35(a)(6) (setting forth standard for remote testimony, which is the same standard to be applied when determining whether to conduct entirety of hearing remotely).

Your Honor has already recognized that videoconference testimony presents sufficient safeguards, having approved witnesses to testify remotely by videoconference as part of Week 3 of the Boston Region hearing and having also approved conducting phases of the hearing by videoconference in those regions where there is only one Charge at issue and therefore only one store location and a limited number of witnesses (for Week 6, Atlanta, and Week 8, Chicago). The Washington D.C. hearing only has the two Charges of Ms. O'Neill and Ms. Christie at issue. Therefore, the Washington D.C. hearing will involve a very limited set of witnesses, making conducting this Week remotely by videoconference more manageable. Further, counsel for Charging Parties will ensure that both Charging Parties have a secure WiFi connection and technology from which to provide remote testimony by videoconference. The availability of videoconference technology makes it entirely unnecessary for Charging Parties O'Neill and Christie to travel across the country, during an ongoing pandemic (with a new variant, B.A.5, threatening resurgence) and at significant personal hardship (including stress on their schedules, finances, and health), as detailed herein. See FTC v. Swedish Match North America, Inc., 197 F.R.D. 1 (D.D.C. 2000) (granting the plaintiff's motion to permit a witness in Oklahoma to testify by videoconference at hearing located in Washington D.C., to avoid "forcing [the witness] to travel across the continent"; finding that appropriate safeguards were in place because witness "will testify through live video in open court, under oath, and defendants will have the opportunity to cross-examine the witness.").

Nevertheless, Whole Foods has refused to agree to Ms. O'Neill and Ms. Christie testifying remotely (and refused to agree to conduct the Washington, D.C. phase of this hearing remotely), despite being informed that these Charging Parties now reside outside the state and face significant challenges in traveling.[1] Charging Parties O'Neill and Christie therefore respectfully request that Your Honor order Week 7, Washington, D.C., to proceed entirely remotely, pursuant to Section 102.35(a)(6) of the Board's Rules, or order that Ms. O'Neill and Ms. Christie be permitted to provide their testimony by remote videoconference means, pursuant to Section 102.35(c) of the Board's Rules. Charging Parties further request the start time of the Week 7, Washington, D.C., hearing be rescheduled to 9 a.m. PST., to accommodate this remote testimony.

II. LEGAL STANDARD

The Board has permitted video witness testimony since its adoption of Section 102.35(c) of the Board's Rules. See EF International Language Schools, 363 NLRB No. 20, slip op. at 202 (2015) (allowing video witness testimony in unfair labor practice cases, as video conference technology allows witness observation for credibility and due process purposes, resolving issues raised in Westside Painting, Inc., 328 NLRB 796 (1999)); see also XPO Cartage, Inc., 370 NLRB No. 10 (2020). Under Section 102.35(c) remote testimony is permitted as follows:

> Upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.

[1] Charging Parties only recently realized the difficulties in-person testimony would present. This Hearing has been proceeding in phases, with the Parties taking up region-specific issues as the phases proceed (for example, resolving subpoena production in phases). Likewise, Whole Foods raised the issue of its manager witness at the Week 2/3 Boston hearing needing to proceed remotely, the night before scheduled testimony, prompting the parties to reconvene remotely to complete the hearing.

Section 102.35(c) applies to "a single witness testify[ing] via video conference at an otherwise in-person hearing . . . " Sparks Rest., 2021 NLRB LEXIS 825, at *2 (N.L.R.B. May 14, 2021). Its "compelling circumstances" standard is identical to the "good cause in compelling circumstances" standard contained in Fed. R. Civ. P. 43, meaning that federal case law may provide useful guidance on the standard.

The Board has recently declined to restrict video conference use, permitting remote witness testimony via video conference so long as the witness has demonstrated "good cause based on compelling circumstances and under appropriate safeguards." See Morrison Healthcare, 369 NLRB No. 76, slip op. at 1 (2020). "The Board has found that the ongoing Covid-19 pandemic establishes good cause based on compelling circumstances for taking video testimony under Section 102.35(c)." Sparks Rest., 2021 NLRB LEXIS 825, at *2; see also Morrison Healthcare, 369 NLRB No. 76, at 1; William Beaumont Hospital, 370 NLRB No. 9, slip op. at 1 (2020); Oxarc, Inc., 2020 NLRB WL 5735979, at *1 (N.L.R.B. Sept. 23, 2020); Local 675 of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. Of the United States & Can., 2020 NLRB LEXIS 451, at *1-2 (N.L.R.B. Sept. 4, 2020); N.Y. Paving, Inc., 2020 NLRB WL 6032640, at *1-2 (N.L.R.B. Oct. 8, 2020); Morgan Corp., 2020 NLRB WL 5814605, at *1-3 (N.L.R.B. Sept. 25, 2020).

The Board has also found that cross-country travel meets this "compelling circumstances" standard, where "the witness might be unable to travel to the hearing due to the time this would take h[er] away from h[er] job []; [s]he would most likely be precluded from testifying if [s]he was not allowed to do so by videoconference; videoconferencing was the only certain means of securing h[er] testimony; and h[er] [] testimony was necessary to prove the complaint allegations." See ALJ Bench Book (January 2022), citing DH Long Point Mgt. LLC,

369 NLRB No. 18, slip op. at 5 n. 9 (2020), enfd. mem. per curiam 858 Fed. Appx. 366 (D.C. Cir. 2021) (enforcing ALJ decision to allow a corroborating witness to testify at LA hearing via video conference from the Board's Philadelphia office). As a general principle, compelling circumstances may exist where "a significant geographic distance separates the witness from the location of court proceeding." Warner v. Cate, 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) (cited in Ever Win International Corp. v. Prong, Inc., 2017 WL 1654063 (C.D. Cal. Jan. 6, 2017) (finding that witness's "East Coast residency present[ed] good faith compelling circumstances" to grant the defendant's request to permit both witnesses to testify by videoconference, where trial was located in California) (collecting case law)); see also EF International Language Schools, 363 NLRB No. 20, at 202 (2015) (finding videoconference testimony of overseas witness did not violate Respondent's due process rights, as international travel may met the "compelling circumstances" standard, given existing time, cost, and visa restrictions); Oncor Electric Delivery Co., 364 NLRB No. 58 (2016) (affirming the judge's ruling granting the General Counsel's motion, over the respondent's objection, to permit former employee of the respondent to testify by videoconference from the NLRB Regional Office in Denver rather than testify in person at the hearing in Fort Worth), vacated and remanded in part on other grounds 887 F.3d 488 (D.C. Cir. 2018).

Witnesses who testify by videoconference are sworn in under oath and testify live via video in open court, with Respondents having the opportunity to cross-examine witnesses; these processes present sufficient safeguards. FTC, 197 F.R.D. 1 (finding that appropriate safeguards were in place because "Mr. Cross will testify through live video in open court, under oath, and defendants will have the opportunity to cross-examine the witness."); see also N.Y. Paving, Inc., 2020 NLRB WL 6032640, at *1 (N.L.R.B. Oct. 8, 2020) ("A video hearing can [] provide for the

observation of witnesses for the purpose of credibility determinations, as well as adequately address other due process and procedural concerns."); Warner, 2015 WL 4645019, at *1 ("Because a witness testifying by video is observed directly with little, if any, delay in transmission [] courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings."). Additional safeguards, such as testifying from an NLRB hearing office or otherwise ensuring that the technology will work and the witness has an appropriate place from which to testify, may also be assist in ensuring proper safeguards are in place. Cf. ALJ Bench Book, January 2022, at p. 138.

Further, due to the COVID-19 crisis, the Board has also instructed that "ALJs [] have the discretionary authority to order an entire hearing [] be held by videoconference with all participants and witnesses appearing remotely from separate locations", pursuant to Section 102.35(a)(6) of the Board's rules. Id. The Board has further held that Section 102.35(c), the framework in considering "good cause based on compelling circumstances and under appropriate safeguards", may be properly applied in determining whether to order a remote hearing, and has upheld ALJ Orders to conduct hearings remotely, over party objections, specifically finding that "advances in current videoconferencing technology" would "be able to address many, if not all, of [objecting party's] procedural concerns."[2] The Board has further recognized the ongoing nature of the pandemic and clarified that there is no "mandate", even in moments where the pandemic ebbs, to return to in-person hearings. Michael Cetta, Inc., 2021 WL 1966555 (May 14,

[2] Id., at pp. 138-139 (citing William Beaumont Hospital, 370 NLRB No. 9 (Aug. 13, 2020) (judge did not abuse his discretion in denying employer's motion requesting an in-person hearing); and XPO Cartage, LLC, 370 NLRB No. 10 (Aug. 20, 2020) (judge did not abuse her discretion in ordering a remote hearing via the Zoom for Government video-conferencing platform, notwithstanding that both the employer and the union appealed the order)).

2021) (holding judge did not abuse his discretion in directing compliance hearing to proceed remotely by videoconference) ("We acknowledge the evolving state of the pandemic, with vaccinations becoming more widespread and some jurisdictions returning to in-person hearings and trials. Nevertheless, we cannot say that conditions have improved so much, whether in New York or elsewhere, as to *mandate* a return to in-person hearings.")

III. ARGUMENT

A. Good Cause Based On Compelling Circumstances Exists to Warrant Remote Testimony or Remote Hearing

As a preliminary matter, the ongoing COVID-19 pandemic presents sufficient grounds upon which to find "good cause based on compelling circumstances" exists. The COVID-19 pandemic is not over. A new variant, B.A. 5., threatens resurgence of the virus, which we have seen ebb and flow over the course of the last two years. This new variant is more resistant to vaccines and is highly transmissible; experts posit this variant will therefore drive a new, reinfection wave. See, e.g., Joel Achenbach, *As the B.A. 5 variant spreads, the risk of coronavirus reinfection grows*, THE WASH. POST, July 10, 2022 ("I understand pandemic fatigue, but the virus is not done with us.") (quoting professor of immunology and expert on long covid).[3] For those who have already have COVID-19, reinfection may carry a higher cumulative risk of severe illness, death, or long haul COVID. Id.

[3] Available at, https://www.washingtonpost.com/health/2022/07/10/omicron-variant-ba5-covid-reinfection/. See also, e.g., Asher Williams, *Many countries have given us a preview of what's to come with COVID subvariant BA.5. Prepare.*, THE BOSTON GLOBE, July 11, 2022, available at https://www.bostonglobe.com/2022/07/11/opinion/many-countries-have-given-us-preview-whats-come-with-covid-subvariant-ba5-prepare/?event=event12 (noting that "[c]ase positivity rates have been higher than they are now only twice since the beginning of the pandemic — during the first weeks of the pandemic, and a few weeks during the January 2022 Omicron spike"); Lauren Leatherby, *What the BA.5 Subvariant Could Mean for the United States*, The N.Y. Times, July 7, 2022, available at https://www.nytimes.com/interactive/2022/07/07/us/ba5-covid-omicron-subvariant.html.

There is also good cause based on compelling circumstances to order remote testimony or proceedings here, where "a significant geographic distance separates [Ms. O'Neill and Ms. Christie] from the location of court proceeding". Warner, 2015 WL 4645019, at *1, cited supra.

Ms. O'Neill no longer lives or works in Virginia. She is currently doing seasonal work in Lewiston, Idaho and resides nearby in Washington state. Ms. O'Neill works as a raft guide, leading groups on five-day wilderness trips. She currently does not have any plans to travel back to Virginia; her items are in storage, and she does not know where she will live after her seasonal work ends in the early fall. Flights back to Washington, D.C. for the hearing are currently approximately $1,000, which Ms. O'Neill is unable to afford. Further, the travel back to D.C. on July 18, and then home on July 20, will present a hardship for Ms. O'Neill, as she would have to immediately turn around upon her return and lead a five-day wilderness trip.

Ms. Christie no longer lives or works in Maryland. She currently resides in Honolulu, Hawaii. While Ms. Christie babysits for a single mother and delivers for Instacart to make ends meet, she is currently struggling and relies on EBT assistance for food purchases. If it were not for this public assistance, Ms. Christie would be at risk for homelessness. Ms. Christie and her husband do not make enough in income to meet their basic needs, which makes Ms. Christie's supplemental income from Instacart crucial. Her husband is also in the process of joining the Air Force and was just recently cleared to go to medical processing this Thursday, on July 14, and could ship out either that day or very soon after; it is critical that Ms. Christie remains at home in Honolulu to process any paperwork when he does ship out.

Ms. Christie does not have any plans to travel back to Maryland; this was uncertain for a time, as she was considering flying home to see her father, who suffered multiple strokes at the end of June. However, Ms. Christie is unable to afford a flight back to Maryland, which is currently approximately $1,300. The travel will also cause Ms. Christie to miss at least two to four (2-4) days of work, as a direct flight is about nine to twelve (9-12) hours, resulting in lost earning and further financial strain. She also is in the process of applying to additional jobs and is worried about being available for any possible interviews she may procure.

In addition to all of the above, Ms. Christie also recently suffered health complications herself. She has been experiencing pain, which would make it difficult to travel, likely due to ovarian health issues. Ms. Christie has been unable to secure medical care, as she is uninsured and cannot afford it. Simply put, it is a very difficult time for Ms. Christie personally and financially and therefore, she cannot travel.

Both these witnesses are expected to provide testimony, as alleged discriminatees, on the subject matter of their Charges, which involve wearing Black Lives Matter messaging to work at their respective Whole Foods locations. In its recent Motion to Sever, Whole Foods suggested that it did not need to collect testimony *at all* from these Charging Parties. The General Counsel and Charging Parties dispute this assertion, as the Charging Parties will be providing relevant testimony on the connection between employees wearing BLM to work at Whole Foods and their concerns about racial equality in their stores and in workplaces generally, Respondent's previously lax enforcement of its appearance rules (relevant to showing that these employees were protesting what they reasonably perceived to be Whole Foods unlawful selective enforcement of the dress code, based on race and anti-organizing sentiments), and the need for a nationwide remedy. This testimony is relevant and non-cumulative; however, this testimony

will not raise a number of disputed facts. As the Parties and Your Honor have recognized, many of the facts in this hearing are largely undisputed (such as the discipline the Charging Parties incurred and the dates on which it was meted out). Your Honor will be able to make the appropriate credibility determinations by videoconference.[4]

B. Appropriate Safeguards Are In Place to Permit Remote Testimony or Hearing

Conditions are in place to protect the integrity of the Charging Parties' testimony. As mentioned, witness testimony has already been taken in this case by remote means, and Your Honor has approved proceeding entirely virtually for at least two weeks of this hearing (for the Atlanta and Chicago regions), inherently recognizing that testimony by videoconference offers sufficient safeguards for the presentation of evidence in this case, particularly where the Region has a limited number of Charges at issue. Board and federal case law also confirm that testimony by instant videoconference sufficiently safeguards due process and procedural concerns. See cases cited supra at pp. 5-6. To bolster these safeguards, counsel for Charging Parties will assist in securing remote technology for Ms. O'Neill and Ms. Christie to testify by videoconference and will be conducting trial runs of the Zoom technology prior to the hearing. (Both witnesses are technologically adept and have met with counsel via Zoom.) Ms. Christie will likely testify from Honolulu, Hawaii, while Ms. O'Neill will likely testify from Lewiston, Idaho.[5] The Parties may also confer regarding any additional safeguards Whole Foods would

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[4] Credibility determinations will mainly be called for regarding testimony on these witnesses' motivations in wearing BLM messaging, which is relevant, but not dispositive in this case. See Senior Citizens Coordinating Council of Co-op City, 330 NLRB 1100, 1104 n.15 (2000) (subjective motivations may be taken into account under "totality of the circumstances" analysis in determining whether the conduct is protected).

[5] Counsel for Charging Parties is investigating setting up the witnesses in secure conference rooms for the remote testimony. Ms. Christie may possibly testify at the Honolulu

like to have in place, such as exchanging potential exhibits (by hard copy or electronic mail) in advance, to ease procedural concerns.

III. CONCLUSION

For the foregoing reasons, Your Honor should grant the request by Charging Parties to testify remotely in this proceeding. Charging Parties' preference would be to conduct the entire Week 7, Washington, D.C., phase of the hearing remotely, on July 19-22, 2022, so that the Parties may maintain these dates. In the alternative, Charging Parties request that Ms. O'Neill and Ms. Christie be permitted to testify remotely by video conference.[6]

Subregional NLRB office; counsel may also be able to secure conference rooms at local counsel's office.

[6] Should it be determined that in-person testimony is necessary, Charging Parties request, as a further alternative, that these witnesses be permitted to testify as part of the later Regional dates. Charing Parties request that Ms. O'Neill be permitted to testify as part of the Week 9, Seattle, WA hearing dates scheduled for August 2-5, and that Ms. Christie be permitted to testify as part of the Weeks 10-12 San Francisco, CA, hearing dates, scheduled for August 9-24. Charging Parties understand that Whole Foods will likely prefer to call its manager witnesses for the Virginia and Maryland store locations (from which Ms. O'Neill and Ms. Christie's charges stem) *after* these Charging Parties have testified. Charging Parties therefore propose these witnesses testify remotely following Ms. O'Neill's and Ms. Christie's respective in-person testimony if necessary.

Dated: July 12, 2022 */s/ Shannon Liss-Riordan*

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LLR CHARGING PARTIES' OPPOSITON TO RESPONDENT'S MOTION TO SEVER

Charging Parties represented by Lichten & Liss-Riordan ("LLR") request permission to submit this Opposition in response to the motion to sever filed by Respondent Whole Foods Market Services, Inc. ("Whole Foods"). LLR Charging Parties join in the Opposition filed by General Counsel and briefly set forth the below to supplement their position regarding the relevancy of testimony provided to date, and forthcoming testimony, from those employees of Respondent who wore "Black Lives Matter" messaging at work.

As General Counsel argues, Charging Parties and other employees of Respondent viewed the strict enforcement of the dress code against their BLM messaging after previously tolerating other violations, as racially motivated. Employees thus protested what they reasonable perceived to be Whole Foods' racially discriminatory enforcement of the dress code and to be pretextual discipline designed to interfere with their right to organize together to advance their rights in the workplace. Employees thus engaged in protected activity by wearing the Black Lives Matter

(BLM) messaging to work *in part* because they did so to protest what they believed, in good faith, to be their employer engaging in unlawful conduct.

Both Board and court case law acknowledge that when employees are engaged in activity to advance their rights in the workplace, regardless of whether the employer conduct they oppose *actually* violates the relevant law, that activity is protected.

Thus, testimony from Charging Parties articulating their reasons for wearing Black Lives Matter messaging to work, and how that reasoning evolved over time, is relevant. Even if employees initially only wore the BLM messaging to display the message in their workplace and convey it to their employer, testimony regarding how those protests evolved over time and took sharper aim at Whole Foods' reaction to their concerted activity of wearing the BLM messaging to work is relevant. As General Counsel highlights in the Opposition, employee protests in reaction to the disparate dress code enforcement also began to encompass additional protected activity (such as presenting demands to leadership, staging walk outs and protests, and banding together nationally). The General Counsel's Complaint encompasses these additional allegations of protected activity. See Complaint ¶¶ 5, 8 (alleging that Charging Parties engaged in various forms of protected conduct in summer of 2020, "**including** by wearing Black Lives Matter messaging at work") (emphasis supplied). Charging Parties also broadly alleged the same in their original Charges.[1]

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[1] Charges submitted by LLR Charging Parties' used the following language:

> The Whole Foods employees file this charge opposing the company's policy of not allowing them to engage in concerted activity of wearing Black Lives Matter masks at work and disciplining employees in response to protesting the policy. The employees are wearing the masks to stand in solidarity with one another and in order to improve the conditions of their workplace. The employees engaging in and supporting this protest are advocating for allowing employees to feel free to express themselves on this important issue at work and protesting Whole Foods' discipline of workers supporting the protest.

Your Honor has suggested in the course of this hearing that if the conduct of disciplining those workers who wore BLM at work in the first place was not unlawful, then Whole Foods continued conduct in disciplining these employees cannot be unlawful. However, that position misses the analysis that the employees' protest of the discipline itself also constituted protected activity, as the employees were protesting what they reasonable perceived to be unlawful conduct by Whole Foods in disciplining them on the basis of the BLM messaging and selectively enforcing the dress code to prevent concerted activity.

The law is clear that when employees protest employer conduct that they reasonably believe to be unlawful, their conduct is protected activity whether or not the underlying employer conduct is unlawful or not. Under the NLRA, the employees' conduct is protected activity because they engaged in concerted activity to protest what they believed to be unlawful discipline imposed by the employer. See Laguardia Assoc., LLP, 357 NLRB 1097, 1099 (2011) (protesting impending layoffs protected, even if employees were mistaken about impending layoffs), citing Wagner-Smith Co., 262 NLRB 999, 999 fn. 2 (1982) ("[I]t is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under the Act, so long as the complaint was not made in bad faith."); First W. Bldg. Servs., 309 NLRB 591, 605 (1992) (complaints about reasonably perceived contract violations protected even if perception is mistaken).[2] This precedent aligns with that of federal

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See, e.g., Ex. 1(a) (Kinzer Charge) (sample charge).

[2] See also Mardi Gras Casino, 359 NLRB 895 (2013) ("The employees' activity in support of the organizational objective of the Union, regardless of the viability of MOA, was protected union activity. Whether they were 'mistaken in suspecting the Respondent of reneging on its agreement' to give the Union access pursuant to the MOA is immaterial insofar as there is no evidence that the employees were acting in bad faith.") (quoting Crown Plaza LaGuardia, 357 NLRB at 1009), reaffd. 361 NLRB 679 (2014); In re Crown Cork and Seal Co., Inc., 2003 WL

courts in interpreting Title VII, which have held that employees need only reasonably *perceive* their employer's actions to be unlawful in order for their activity to fall within the protections of Title VII's anti-retaliation provision. See, e.g., Fantini v. Salem State College, 557 F.3d 22, 32 (1st Cir. 2009) (holding that employee need only demonstrate that she "had a good faith, reasonable belief that the underlying challenged actions of the employer violated the law" to establish oppositional activity as protected) (internal citations omitted); Trent v. Valley Elec. Ass'n, Inc., 41 F.3d 524, 526 (9th Cir. 1994) (holding that "a plaintiff does not need to prove the employment practice at issue was in fact unlawful under Title VII," she "must only show that she had a 'reasonable belief' that the employment practice she protested was prohibited under Title VII."). See also Smith v. Winter Place, LLC, 447 Mass. 363, 364 n. 4 (holding that viability of underlying wage claim irrelevant for purposes of retaliation claim brought under the Wage Act). Thus, this theory of the case cannot be circular because it does not rely on proving the unlawfulness of the conduct that gave rise to the protected activity.[3]

22082151 (Sept. 3, 2003) ("[A]n employee who files a grievance under the contract because he or she honestly and reasonably believes his employer has violated a right ground in a governing collective bargaining agreement is engaged in concerted, protected activity even if his belief is incorrect.") (citing First W. Bldg. Servs., 309 NLRB at 605); cf. United Brotherhood of Carpenters Fifth Submission, Regional Advice Memorandum, 19-CA-190626 (Dec. 22, 2020) (advising that staffer was engaged in Section 7 activity when dissenting against chief steward's expulsion, based on potential chilling effect, and finding "it [] unnecessary to prove that the expulsion of the chief steward was also unlawful").

[3] Charging parties recognize, however that the First Circuit did not accept this argument in the appeal of Frith v. Whole Foods, No. 21-1171 (1st Cir.). That opinion, however, does not control here, as it was decided under Title VII case law and was an appeal from a motion to dismiss, where only the pleadings were in the record. In contrast here, the ALJ will be able to decide these assertions on a full evidentiary record. Thus, the ALJ will be able to determine whether Whole Foods' continued discipline of the employees was at all in part a response to employees engaging in this concerted activity.

In sum, employees wearing BLM messaging to work (and related protest activities) in part constitute protected activity because these employees undertook this action to protest what they reasonably perceived to be unlawful and racially discriminatory discipline meted out by Whole Foods – as well as what they reasonably perceived to be interference with their concerted activity. Thus, even if Your Honor were to conclude that employees' wearing of the BLM messaging to work *in and of itself* is not protected conduct, Your Honor may still find the employees' subsequent decision(s) to continue wearing BLM messaging to work in protest of Whole Foods disciplining them and their co-workers (and deterring them from engaging in further concerted activity), to be protected. Relevant to these allegations of protected activity is evidence that Whole Foods had not previously enforced its dress code against employees who wore non-Whole Foods related messaging (which supports Charging Parties' good faith perception of the discipline as racially discriminatory and pretext for silencing Whole Foods employees and interfering with their concerted activity). Evidence regarding the workers' subjective intent in wearing the BLM messaging to work, and how that intent evolved over time and related to other protest activities (such as planned rallies and walk outs), is also relevant to these allegations. Therefore, additional testimony from Charging Parties is relevant to establishing the timeline of employees wearing the BLM messaging to work, Respondent's discipline of the same, and then steps these employees and their coworkers took in response to the discipline and their motivations in so doing.

For this reason, as well as those presented in the General Counsel's Opposition, LLR Charging Parties submit that the Motion to Sever should be denied, so that Your Honor may hear these important facts regarding timing and employees' subjective motivations and reasonable perception that Whole Foods was engaging in unlawful conduct by disciplining them for wearing

BLM messaging (in contrast to Respondent's lenient enforcement of the dress code in other contexts). Charging Parties concurrently submit a Motion for Remote Testimony, so that the testimony of the D.C. witnesses may be heard and this phase of the hearing conducted virtually.

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/s/ Shannon Liss-Riordan

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